

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In re Application No. 93-2)	PREHEARING ORDER NO. 8	682
of)		
KVA RESOURCES, INC., and)	ORDER GRANTING MOTION, IN PART;	
CSW ENERGY, INC.)	MODIFYING PREHEARING ORDER NO.4	
)		
For Certification of the)		
NORTHWEST REGIONAL)		
POWER FACILITY)		

This matter involves an application by CSW Energy, Inc., and KVA Resources, Inc., ("KVA") for certification of a site at Creston, Washington under Chapter 80.50 RCW. Counsel for the Environment, Asst. Attorney General Deborah Mull, moved for a change in the Council's processes; for a substantial delay in the timing of parties' filing of direct evidence; and for changes in administrative practices, disclosure of certain alleged ex parte discussions, and opportunity to rebut alleged ex parte information. The applicant, KVA Resources, Inc. and CSW Energy, Inc., by attorneys Darrell Peebles and Charles W. Lean, answered.

A. Nature of the Motion. Counsel for the Environment filed a motion on June 21, 1995, to modify two previous prehearing orders entered by the Council. She requests that the Council enter an order granting the following relief:

- (1) Modifying Pre-hearing Order No. 4 to provide that the Council will consider the Final Environmental Impact Statement (FEIS) in its deliberative process;
- (2) Modifying Pre-hearing Order No. 3 to delay the time for prefiling direct evidence until after the Council adopts the FEIS; and
- (3) Stating that EFSEC will (a) start taking minutes of its Executive Committee Meetings, (b) require the applicant to copy any and all correspondence addressed to EFSEC to the parties of record, (c) advise the parties of any ex parte communication that has occurred to date between itself and the applicant and (d) allow parties an opportunity to rebut the same

Applicant's Response. The Applicant opposed the proposed schedule change, did not object to clarification of the prehearing order relating to consideration of the final environmental impact statement, and did not comment on the administrative matters.

I. Consideration of the FEIS in the Deliberative Process. Counsel for the Environment requests modification of language in Prehearing Order No. 4 that states:

Basis for Decision. The Administrative Procedure Act requires the Council to confine its decision to the record, including testimony and exhibits that are received in evidence and submissions such as briefs that it allows parties to present. The Council will comply with that requirement. Council members will disregard case-specific information received in other contexts.

Counsel for the Environment requests that EFSEC either (1) continue the adjudicative hearing so that the final EIS can be produced and made part of the adjudicative record before conclusion of the evidentiary hearing, or (2) consider evidence outside the adjudicative record, including the FEIS, when making its decision on the application.

She argues that by completing the EIS before the start of the adjudicative hearing, EFSEC would be better informed about the issues that will be raised during the hearing, the process would be streamlined through the avoidance of duplicative information gathering, parties would have the opportunity to challenge the adequacy of the draft or final EIS during the adjudicative hearing, and ex parte communications between the applicant and the Council would be minimized.

The Applicant responds by noting that under SEPA, EFSEC has discretion in timing its SEPA environmental review, and that it exercised that discretion in adopting WAC 463-47-060(3), mandating completion of the adjudicative proceeding prior to issuance of the FEIS. The Applicant also argues that the adjudicative hearing should precede the issuance of the FEIS in order to allow the FEIS to reflect comments made during the hearing. That timing, it argues, protects persons interested in making comments on the DEIS from having to comply with the rules of evidence and becoming subject to cross examination.

Last, the Applicant argues that EFSEC is required by law to consider both the FEIS and the adjudicative record during its "deliberative process" prior to making a final decision. It contends that the environmental evaluation under SEPA need not be done on the record of the adjudication for the Council to consider it in its adjudicative order, inasmuch as the APA's requirement to consider only evidence of record, RCW 34.05.476(3), bears the exception of matter required by another statute to be so considered. The applicant contends that SEPA is such a statute.

Discussion. As required by law, the Council will follow all applicable requirements relating to its decision when conducting both the APA adjudication under Chapter 34.05 RCW and the SEPA environmental review under the State Environmental Policy Act.

Running the two processes contemporaneously allows each to develop under its own law. The purposes of SEPA review and EFSEC's adjudicative process are remarkably consistent. The essence of each is to (1) assure that the Council make an enlightened decision based on a complete review of the proposal's potential environmental consequences, and (2) assure that the

public has a full opportunity to participate in the Council's deliberative process. The Council intends to accomplish both of these requirements in a lawful manner.

The Council is not convinced that the Administrative Procedure Act would allow the Council to consider information received in the environmental review but not on the record of the adjudication. The Applicant's suggested procedure appears to offer a sensible way to proceed, but the Council is concerned that it might not comply with APA requirements. Attempting to follow Applicant's suggestion, only to find later that it constitutes an improper procedure, could require substantial additional time and litigation expense. The Council therefore adopts the following as a means to ensure that all pertinent procedural requirements are met.¹

The Council will permit any party to offer the DEIS as an exhibit, and if it is offered, will direct the consultant responsible for its substantive information to respond to questions about it. Because the preparation of the DEIS is not an issue in the adjudication,² the Council will not permit questions relating to its structure, reasons why material may have been included or omitted, etc. All parties have been allowed access to such information and the Council does not believe that this ruling will affect parties' preparation.

The Council will receive as an exhibit the comments to the DEIS. It believes that the comments may be received for purposes of SEPA without cross examination under APA requirements. Requiring commenters to appear to defend their comments as a condition for considering those comments appears to thwart the purpose of SEPA. The Council anticipates using the written SEPA comments that are addressed to the DEIS in preparing the FEIS.

The Council will schedule an adjudicative hearing session to receive comments from members of the public on any matter within the Council's jurisdiction that is relevant to the Council's decision on the application. Matters addressed may therefore include the DEIS, the PSD and NPDES permits, and the application itself. The Council will permit parties to inquire of public witnesses on relevant topics, recognizing that the witnesses are appearing as members of the public and thus should be allowed considerable latitude and treated with consideration and respect by all parties.

Finally, the Council will prepare a final environmental impact statement (FEIS) based on the DEIS, comments addressed to the DEIS, and information and argument that emerge during the adjudication. Because the FEIS will be the Council's work product, it will not be evidence in the adjudication. The parties will have the opportunity to present for the record all of the

¹The Council here sets out the basic elements of the suggested procedure, and will entertain further consideration and refinement in the prehearing conference process.

²Parties who believe that the DEIS is insufficient have the remedy of submitting comments.

information on which the FEIS is based, and to seek further review of the FEIS under appropriate process

To the extent that Prehearing Order No. 4 may have implied that the Council would not consider the FEIS when making its decision, the order is deemed modified.³ Counsel for the Environment's first request -- to delay the proceeding until after issuance of the FEIS -- is denied. To rule otherwise would be a violation of the regulations governing the Council and -- demonstrating the rationale of the Council's regulations -- could result in an inadequate FEIS.⁴ Counsel for the Environment raised the concern that allowing the processes to occur on parallel tracks could require parties to duplicate their efforts. The process we identify eliminates that need by bringing the adjudicative record into the SEPA process.

The Council has addressed the concerns raised by Counsel for the Environment (access to EIS information) by directing that substantive information be released to parties who request it and, in this order, by allowing the DEIS and comments to be offered to the record. All parties have had the opportunity to participate in the SEPA process since the filing of the application. The SEPA process is not a part of the adjudication.

2. Extension of time to file evidence until after the Council adopts the FEIS.

Counsel for the Environment's second request is to delay the deadline by which intervenor parties must pre-file direct evidence until after the Council adopts the FEIS.

As we have noted above, the Council will conclude the evidentiary hearings prior to adopting the FEIS. This is consistent with WAC 463-47-060(3) and with the rationale underlying that rule. For the process-related reasons discussed above, the Council denies this request.

3. Ex parte and procedural requests.

a. Executive Committee Meeting Minutes. Counsel for the Environment asks that the Council begin taking minutes of its executive committee meetings. Counsel may be under the mistaken idea that no minutes are kept. Minutes are kept, and they are available to Counsel and the public. The minutes have not regularly been edited and published for some time; the Council

³The Council will also exercise its full prerogatives under law to conduct its own legal research. Such research may include the consideration and use of appropriate legal resources without regard of whether these have been cited to the Council by a party.

⁴If the Council's Order and the FEIS were on separate tracks, with the FEIS preceding the adjudicative process to conclusion, adoption, and appeal, before the other were prepared, there would be a risk that important matters might become apparent in the later process that could invalidate the earlier process.

agrees that it is appropriate to do so and it directs the Council staff to begin doing so immediately.

b. Copies of Correspondence. All pleadings and other adjudication-related correspondence must be copied to all parties. Counsel for the Environment apparently asks that non-adjudicative-related correspondence be copied to all parties. She does not indicate that she has asked the Applicant and been denied. She does not demonstrate how that is necessary to her and intervenors' participation in the adjudication, nor how failure to do so will prejudice them. It appears that any such documents are available for inspection.

The Council will not order the requested action. It notes, however, that the Applicant did not object to the request. Related processes are occurring contemporaneously, and universal information about the processes may ease parties' concerns. Therefore, the Council suggests that the Applicant's voluntary compliance with the request -- as to those parties who want the copies -- will resolve a potential irritation. Consistent with the Applicant's request, the Council also suggests that other parties offer the same courtesy to those who request it.

c. Disclosure of ex parte contacts. Counsel for the Environment asks that the Council disclose the substance of all ex parte contacts it has had with the applicant. This presupposes the validity of her assumption that ex parte contacts have occurred.⁵ We do not believe that the assumption is valid. A review of the documents appended to the Counsel for the Environment's motion indicate that the matters treated were not within the scope of the adjudication, but rather, related to scoping of the EIS and the Council's preliminary determination as to sufficiency of the application for adjudicative determination.⁶ Both those issues appear to be outside of the adjudication and not subject to ex parte requirements.

b. Rebuttal of Alleged Ex parte Communications. Because we find that no ex parte contact has been made, it is inappropriate to rule that rebuttal must be allowed. If an instance of ex parte contact is discovered, the Council will allow rebuttal as required by law.

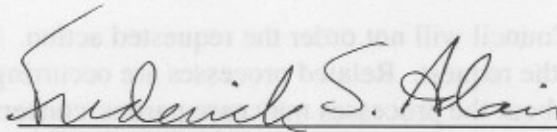
⁵An ex parte contact is one relating to issues in an adjudication that takes place without prior notification to all parties to the adjudication. It therefore requires (a) the existence of an adjudication; (b) the existence of a contact; (c) that the subject relates to an issue in the proceeding; and (d) that it is not exempt from consideration as ex parte as a procedural issue or under the provisions of another law.

⁶This is the preliminary question as to whether the application addresses the Council's guidelines, and does not relate in any way to questions of whether the presented information is sufficient to support a decision granting the application.

ORDER

THE COUNCIL ORDERS: That prehearing Order No. 4 is modified to the extent that it may imply that the Council will not consider the FEIS when making its final decision. As required by law, the Council will do so. The Council denies the request to modify Prehearing Order No. 3 and denies other relief requested in the motion.

Dated at Olympia, Washington and effective this 18th day of July, 1995.



Frederick S. Adair, Chair
Energy Facility Site Evaluation Council

NOTICE TO PARTICIPANTS: Unless modified, this prehearing order will control the course of the hearing. RCW 34.05.431; WAC 463-30-270(3). Objections to this order must be filed in writing with the Council within ten days after the date of this order. WAC 463-30-270(3).